to have adopted for tax law the discredited "but for" theory of negligence law.

3. The decision of the Court of Appeals conflicts with the principle enunciated by this Court in *Dobson* v. *Commissioner*, 321 U. S. 231, as follows:

> "The weakness of taxpayers' position lies in the fact that not every gain growing out of a transaction concerning capital assets is allowed the benefits of the capital gains tax provision. Those are limited by definition to gains from 'the sale or exchange' of capital assets. Internal Revenue Code, §117(2), (3), (4), (5).
>
> We certainly cannot say that the items in question were as matter of law proceeds of the 'sale or exchange' of a capital asset. Harwick asserted a claim, and the three other taxpayers involved in these cases filed suit against the National City Company, demanding rescission of their purchases of stock. Their claims were compromised or admitted; the taxpayers seek to link the recoveries resulting therefrom with their prior sales of the stock, which resulted in losses. The Tax Court did not find as matter of fact, and we decline to say as matter of law, that such a transaction is a 'sale or exchange' of a capital asset in the accepted meaning of those terms."

4. The issue cuts deeper than the mere application of the annual accounting rule. Gain or loss from a sale arises when the sale is consummated—not prior or subsequently to the sale. If at the date of sale, of transfer of title and the receipt of the purchase price, no obligation exists, whether or not then recognized, to return part of the purchase price, the sale is a closed transaction. There is no more basic principle of tax law. If thereafter, in the same year or later, liability for a payment by the seller to the

buyer arises because of events occurring after the date of sale, such payment cannot be a loss from the sale.

The *Arrowsmith* case was apparently argued as governed solely by the annual accounting rule, since it was not denied that if the return of part of the distribution had occurred during the same taxable year it would have been treated as a capital loss reducing the previous capital gain. If so, the distribution was not a true closed transaction, which depends on substantive law and not on tax accounting.

It is submitted that because of its importance to the revenue and of its equal importance to taxpayers generally this Court should clarify its decision in the *Arrowsmith* case by ruling that it applies only to transactions incomplete because subject to existing liabilities, known or unknown, as in the *Arrowsmith* case, or that it extends to fully closed transactions accompanied by collateral agreements contingently affecting future income, as in the *Duveen* case. A guide to the scope of the exception from the general rule of "losses from the sale or exchange of capital assets" is vital to an orderly and sound administration of the tax law.

For the foregoing reasons it is respectfully urged that this petition for reconsideration of the petition for certiorari be granted and a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

HUGH SATTERLEE,
ROLLIN BROWNE,
Counsel for the Petitioner.

Dated November 26, 1952.

CERTIFICATE.

I, HUGH SATTERLEE, counsel for the above-named petitioner, do hereby certify that the foregoing petition for reconsideration of the petition for writ of certiorari in this cause is presented in good faith and not for delay.

HUGH SATTERLEE,
Counsel for Petitioner.